IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 53 OF 1993

Malegaon Municipal Council,
District Nashik ..Appellants
(Ori. Defendant)

versus

1. Mangalchand Hastimal Golecha
2. Vimalchand Mangalchand Jain ..Respondents
(Ori.Plaintiffs)

Mr. Prashant Naik for the Appellants.
Mr. P. K. Dhakephalkar for the Respondents.

CORAM : D. G. DESHPANDE,J.

DATE : 9TH FEBRUARY,2005

ORAL ORAL :

1. Heard counsel for the Appellants and the Respondents.

2. This Appeal is filed by Malegaon Municipal Council, District Nashik against the decree passed by Civil Judge, Senior Division, Malegaon on 23.9.1992 allowing claim of the plaintiffs of Rs.3 lacs and awarding interest at the rate of 12% per annum from the date of possession i.e. 6.3.1982

till payment and also awarded 30% solatium on the market price of Rs.3 lacs from the date of possession till recovery and costs of the suit.

3. The case of the plaintiffs was that they are the joint owners of the property. The suit property according to the plaintiffs was CTS No.163/1A admeasuring 160x50 feet i.e. approximately 8000 sq. ft. and the boundaries of the said land are, to the East S. No. 163/1, to the West S. No.162. to the North S.No.163/1 (owned by the plaintiffs), to the South S. No. 314.

4. It was further case of the plaintiffs that appellants passed resolution on 11.9.1980 to take possession of the suit property by applying urgency clause under the M.R.T.P. Act. Subsequently on 11.3.1982 an agreement came to be executed between the parties i.e. plaintiffs and the defendants whereby defendants agreed to refer the matter to the Town Planning for valuation and then agreed to pay compensation as per the valuation within stipulated period. Since no valuation was got done by the appellants, the plaintiffs gave legal notice through their Advocate and then filed a suit claiming market price at Rs.37.50 per sq.feet and also interest etc.

5. The claim of the plaintiffs was resisted by

the Defendants on number of grounds, viz. that the suit was barred by limitation, that the appellant had got the valuation done through Town Planning and therefore when the Plaintiffs have agreed to take compensation under the MRTP Act, they could not get market value of the land as per the provisions of the Land Acquisition Act. According to the defendants therefore the plaintiffs were entitled to compensation as fixed by the valuer i.e. Town Planning Department.

6. In view of these facts, issues were framed by the trial court and the parties went on trial. Both the parties examined witnesses in support of their contentions. Ultimately the court decreed the claim of the plaintiffs in its entirety. Therefore, this Appeal by the Defendants _ Malegaon Municipal Council.

7. At the outset, Mr. Naik contended that granting 30% solatium on the market price of Rs.3 lacs from the date of possession in addition to 12% interest, would mean that the Respondents will get 42% interest on the amount of Rs.3 lacs and according to him this was not at all demanded nor permissible and not legal. Mr. Dhakephalkar for the respondents fairly conceded that he will not support the judgment and decree regarding grant of

30% solatium on the principal amount of Rs.3 lacs when 12% interest is already granted. But he contended that interest awarded at 12% per annum should not be reduced and it cannot be reduced further.

8. So far as merits of the matter is concerned, it appears from the judgment of the trial court that the trial court proceeded on the basis that what was offered by the plaintiffs and taken by the defendants was C.T.S. No.163/1A and report of the valuer was in respect of Survey No.163/1A but it was about 163/1 only and therefore the trial court came to the conclusion that the appellant had not got the acquired property valued and therefore the Municipal council was liable to pay compensation under the provisions of the land Acquisition Act. It is this finding and observation and conclusion of the trial court that is seriously challenged by the appellants because it goes to the root of the matter. In fact this is a question going to the root of the matter.

9. Agreement between the parties is at Exhibit 61. It is between the appellants and the respondents i.e. executed by Mangalchand Hatimal on behalf of Rawatchand Ramanlal. This agreement mentions that while resolution No. 139 dated 11.9.1980 of Survey No. 168 which was subsequently

numbered as 161, land situate at 58 Lay Out Ward in Malegaon city was reserved for 50 ft. east west road. The parties agreed that valuation should be obtained from Assistant Director of Town Planning, Nashik, and then at the price determined by the valuer the plaintiffs property will be purchased by the Municipal Council. Secondly, the expenses for valuation and sale deed were to be borne by the Municipal Council.

10. From paragraphs 12 to 15 the trial court has dealt with two aspects, mainly, firstly, according to the trial court the Municipal Council - appellants did not get valuation done within eight days or within fifteen days as contemplated by the agreement, and this is sheer negligence on the part of the Municipal Council. Secondly, valuation that is produced on record is on survey No.161 whereas acquired land is survey No.163/1A. Therefore according to the trial court valuation of the suit land never reached the office of the Municipal Council till the date of the judgment and therefore since there was no valuation under the MRTP Act the trial court justified in awarding compensation under the Land Accusations Act i.e. as per the market price claimed by the plaintiffs - respondents.

11. Out of the two findings above, second

finding regarding the acquired land and non submission of valuation report, is patently wrong and perverse for the following reasons.

12. The plaintiffs have come up with a case that about 8000 sq. ft. of their land was acquired by the Municipality for D.P. Road under the MRTP Act. This acquisition was in pursuance of resolution passed by the appellants - council and the agreement was entered into between the Municipal Council and the plaintiff in respect of this 8000 sq. ft. land and actual physical possession under Urgency clause was taken from the plaintiffs of this 8000 sq. ft. of land. This is an admitted position and nobody is disputing the same.

13. Therefore what is clear is that for the D.P. Road, certain land of the plaintiffs was taken possession of and agreement was entered into in pursuance of resolution and was entered between the plaintiff and the Municipal Council in respect of that land. Therefore the plaintiff knows which land of their is the subject matter of acquisition, which land of their is the subject matter of resolution and which land of their is the subject matter of the agreement. There is no confusion on the part of the plaintiffs or on the part of the Municipal Council in this regard, at any stage. It is not the case of

the plaintiff in addition that the agreement was entered into in respect of one particular land and possession of some other land was taken. Nowhere in the plaint nor in their notice given before the institution of the suit they have come up with such a case. Therefore, there is a certainty between the plaintiffs and the defendants and as such is no confusion amongst them about the land that was the subject matter of resolution, the land that was the subject matter of possession under urgency clause and the land by which or through which D.P. road was to pass. There is also no dispute about the area sought to be acquired and the area of which possession is given.

14. However, what the plaintiffs are trying to do and they are doing, with complete dishonestly on their part, is that they are trying to take advantage of some mentioning of survey number here and there. In the agreement survey number is referred to as revenue survey No.168 from 58 layout Navapura. But actually it should have been 161 only or 161/1. However, plaintiffs have referred to in the plaint property acquired as Survey No.163/1A and the entire suit is based on this premise that the acquired property was 163/1A and not 163/1. If that is so and if this is really the case of the plaintiffs then the plaintiffs were accepted to take

serious objection before the institution of the suit in their notices to the effect that the appellants -Municipal Council has entered into agreement in respect of acquiring one particular survey number but they have taken possession of another survey number, but it is nowhere the case of the plaintiffs before the institution of the suit. Neither in the suit the plaintiffs have come up with a case that the land acquired was 163/1A (as per the case of the plaintiffs) the Municipal council has taken possession of Survey No.161/1 and that was contrary to the agreement, action of the Municipal Council was illegal and it amounted to trespass and encroachment on the plaintiffs property, which was not the subject matter of acquisition. But nowhere the plaintiffs have raised this contention in the plaint, and, this is obviously because the plaintiffs know and were knowing, from where D.P. Road was passing, where their land was situate and how much area was to be acquired and in respect of which land they have entered into agreement with Municipal Council. it is therefore clear that inspite of certainty between the parties in all these material aspects the plaintiffs contended that it was Survey No.163/1A which was the subject matter of the acquisition. Obviously this is an attempt by the plaintiffs to exploit to his best advantage. The mistake that might have occurred in the best in

the agreement while giving a particular survey number i.e. 161 in place of 168.

15. it appears that the plaintiffs have referred to the suit property, which was the subject matter of resolution of the Municipal Council, the property that was the subject matter of agreement, the property that was subject matter of invoking Urgency Clause and the property from which the DP Road was to pass as per the development plan and Survey No. 163/1A only because the report of the surveyor from Town Planning Department was received by the Municipal Council and it was in respect of four survey numbers, viz. 160, 161, 162 and 163. It is clear that the plaintiffs though has entered into an agreement with the Municipal Council to take compensation as may be fixed by the valuer of the town planning under section 126, they wanted to claim compensation on the basis of the provisions of Land Acquisition Act i.e. at market rate. Therefore in order to overcome the report of the Town Planning and Valuation Department which was there from 30.3.1984, they have tried to assert and contend that the acquired land was having survey No.. 161/1A. This most important aspect of the matter was not at all considered by the trial court while granting decree in favour of the plaintiffs. In fact if the pleadings of the parties and the

documents between the parties were carefully and minutely scrutinised then the court would have realised that the plaintiffs were trying to take advantage of the situation and exploit the situation in order to give gobye to the agreement under which they had agreed to receive compensation as fixed by the valuer of the Town Planning Department.

16. The plaintiffs were trying to claim compensation on market rate on the basis that the Town Planning Department did not submit any valuation report. The valuation report as stated by them is on record. It is dated 30.3.1984 Exhibit 106. This document also falsifies the case of the plaintiffs. The subject of the said report is as under:

> "Valuation of land under 60’ wide D.P. Road, passing through S. No.160/-1, 161, 162-2 and 163-1 in Development Plan of Malegaon (R)."

17. Nowhere it is the case of the plaintiffs that there were two D.P. roads in Malegaon and the D.P. road to which there is a reference in this report was different from the D.P. Road which was passing through plaintiffs field. Therefore the plaintiffs knew that there was one D.P. Road to

which there was a reference in this report and it was the same D.P. Road that was passing through the land of the plaintiffs. In second paragraph of this report it is stated " Now the amount of payable compensation to the owners of S. No. 1601/1, 161 - 162-2 and 163-1 affected by 50’ wide Development Plan road in sanctioned Development Plan of Malegaon is as under." This recitals in the report clearly show that the valuer was speaking with reference to the development plan of Malegaon which was only Development Plan, then he was speaking with reference to 50 ft. wide developed road which was the only road with which the parties are concerned and then he was speaking with reference to the particular survey numbers, through which that D.P. road was passing. I have already observed and held that it is not the case of the plaintiffs that even though the land acquired was from Survey No.161 1/A the Municipal Council had taken possession of some other land of them, viz. 161/1. This is not the case of the plaintiffs, the plaintiffs have nowhere put up their case that survey No.161/1 or survey No.161 1/A are two different distinct and two different separate numbers with different areas or similar areas. The plaintiffs knew about the development plan of Malegaon, they knew from which land of their D.P. Road is passing and they also knew in respect of which property agreement was

executed with the Municipal Council in respect of which property of their resolution is passed by the Municipal Council. Therefore there is a certainty of object between the plaintiffs and the defendants but the plaintiffs are trying to twist the facts to their convenience and in order to take advantage of some delay in submitting the report, they have contended that the agreement was in respect of survey No.161/1A. There is no substance nor any force in these submissions. The case of the plaintiffs is on wrong and false premise and it is a clear instance of dishonesty on the part of the plaintiffs and the dishonesty, is obviously to exploit the situation and claim market price for their land because there was some delay on the part of the Town Planning and Valuation Department in submitting their report. In fact agreement executed by them under Section 126 of the MRTP Act, 1966 decides the manner in which the valuation has to be fixed and that manner the valuation made by the Town Planning and Valuation Department. It appears that the plaintiffs knew that they are not going to get market price if they relied upon the valuation report of the Town Planning Department and therefore in order to overcome this difficulty and in order to make more claim of compensation, they have dishonestly raised a contention that the land acquired was 163 1/A and there was no report of the

valuation in respect of survey No.163 1/A. Therefore the entire approach of the trial court in granting decree to the plaintiffs, is wrong. The court has lost sight of the most vital and important aspect of this matter. The Court could not separate grain from chaff and fell in the trap of the plaintiffs who were trying to confuse the whole issue by suppressing truth on the basis of false case and wrong pleadings.

18. Second finding of the court is that the Municipal Council did not submit and produce the report within time and even though it was agreed that the matter was to be referred for valuation within eight days, it was not referred and the report was not submitted within time. I have already reproduced all the vital terms and conditions of Agreement Exhibit 61, nowhere any time limit is fixed for the Town Planning Department for completing the valuation and submitting their report. What is provided in clause 2 is that the sale deed should be executed within 15 days after the receipt of valuation report. Clause 4 provides that if the sale deed is not executed within 15 days of the valuation report, the Municipal Council will have to give interest at bank rate and clause 5 provides that the matter was to be referred for valuation within eight days. Therefore, it is clear

from the aforesaid terms that no time limit is laid down nor fixed as between the parties for getting valuation report. The time limit is with reference to only three aspects, as stated above, and which does not include the period for submission of valuation report. The trial court while deciding the issue wrongly and erroneously held that " It was agreed by the Council that it will bring the valuation report within 8 days from March 1982 but the valuation report according to the defendants Council is brought in the year 1984." These observations and findings are totally baseless. there is no time limit fixed for getting the valuation report. I have already reproduced all the vital terms and conditions of the agreement above, and there is no time limit agreed to by the Council to get the report. Therefore this finding is totally wrong and perverse. Consequently the finding that the Municipal Council committed breach of the agreement is also wrong and perverse. The court awarded compensation at market rate under the Land Acquisition Act and in paragraph 31 of the judgment the court has observed in this regard that "For determining the market price, it has been specifically stated that in the absence of any express repugency of inconsistent provisions in the two Acts i.e. M.R.T.P. Act 1966 and Land Acquisition Act, 1994, it should be held that the

proceeding for acquiring the land could be taken by the State Government under the Land Acquisition Act, 1894. Further in paragraph 27 and other paragraphs also the trial court repeatedly held that the Municipal Council committed breach of the agreement, firstly, in not getting the valuation report within eight days and secondly in not getting valuation report in respect of survey No. 163 1/A. Both these findings are absolutely and completely wrong, they are contrary to the records, contrary to the agreement and consequently fixation of the price of the plaintiffs property on the basis of market value is wrong, plaintiffs can get at the most price fixed by the valuer in their report, Exhibit 106.

19. Regarding this report of the valuer Mr. Dhakephalkar contended that this report was prepared by one Mr. Jyotsna Choubal Deshpande, Assistant Director of Town Planning, Nashik, and she was not examined by the court or by the Municipal Council and therefore the report cannot be said to have been proved. According to him this report was proved by somebody having no personal knowledge of the valuation. I do not find any substance in the submission. It is in fact contrary to the record.

20. Municipal Council examined Manohar Ramchandra Raste D. W. 2. He was serving at the relevant time as a town planner. He has stated that

Municipal Council has sent this case to their office for valuation by their letter dated 13.10.1982 and valuation was completed on 30.3.1984. The report was tendered by him. It was Exhibit 106. In the cross examination he stated that he was serving as an Assistant Town Planner in Nashik Road office. He has completed his Master of Engineering on Civil Side. He has assisted Smt. Jyotsna Choubal Deshpande at the time of valuation. He had stated that he had measured the plaintiffs land from map and valuation could be done without visiting the site. He has also stated that he had helped Smt. Jyotsna Choubal Deshpande in this valuation and it was prepared by him and approved by her and therefore there is no force in the objection of Mr. Dhakephalkar that the valuation report is not properly proved or it is proved by somebody having no personal knowledge. The witness is well qualified. He is an officer from the department and he has in fact assisted in valuation and prepared his report which was subsequently approved by the higher superior. Therefore, this objection is also required to be rejected.

21. For all the reasons stated above, the decree passed in favour of the respondents cannot be upheld. Their land has been acquired and they are entitled for compensation, but the compensation will

be as per the valuation made by the Town Planning Department vide Exhibit 106 and the valuation comes to Rs.31,800/- and interest at the rate of 12% per annum which is awarded to the plaintiffs - respondents from the date of the suit till realisation.

22. It is required to be mentioned that in order to clarify the position as to the land acquired and land which was the subject matter of the acquisition and the land of which possession was given by the respondents - plaintiffs, I asked counsel for the Appellants - Mr. Naik to produce relevant map i.e. the Development Plan. He accordingly produced it.

But counsel for the Respondents - Mr. Dhakephalkar urged that this is an appeal and no fresh evidence / document can be permitted to be given, unless there is an affidavit and other parties are in a position to file reply. In view of this objection, I am not referring to the map and I have not referred to the map. Counsel for the Respondents also filed one 7/12 extract but that also has to be disregarded for the same reason. In the result, I pass the following order:

ORDER

. Appeal is partly allowed. Judgment and

Decree granting compensation at Rs.3 lacs at the rate of Rs.37.50 praise per sq. ft. to the Plaintiffs - Respondents along with interest and solatium as granted by the trial court, is set aside. In place the Plaintiffs - Respondents will be entitled to Rs.31,800/- with interest at the rate of 12% per annum from the date of possession till payment. The Plaintiffs - Respondents will get proportionate costs of the suit in the lower court. The Appellants will get proportionate cost of the Appeal in this court. Appeal disposed of accordingly.

. The amount withdrawn by the Plaintiffs - Respondents will be returned to the Appellants - Council within six weeks otherwise they will be liable to pay interest at the rate which is granted by the trial court.

9.2.2005 (D. G. DESHPANDE, J.)